In The

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 79-290

ELMER H. THOMASSEN

Petitioner

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT.

ELMER H. THOMASSEN
in propria persona
1918 Dover Drive
Newport Beach, Calif. 92660
714/540-4376

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INDEX

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

FEDERAL RULES

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1978

No. 79-290

ELMER H. THOMASSEN,

Petitioner,

v.

COMMISSIONER OF THE INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner ELMER H. THOMASSEN prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, rendered March 12, 1979 and rehearing denied May 23, 1979, which affirms the June 2, 1975 orders of the United States Tax Court in Los Angeles, California in consolidated cases 5098-72, 5337-73 and 2949-74. Ninth Circuit Docket No. 76-2620.

OPINIONS BELOW

Ninth Circuit. There was no formal opinion rendered by the U.S. Court of Appeals for the Ninth Circuit. The slip opinion Memorandum and judgment entered March 12, 1979 affirming the orders of the Tax Court are set forth in the appendix at A- 2. Also set forth in the appendix at A-1 is the denial of the petition for rehearing filed May 23, 1979.

Tax Court. There was no formal opinion in the Tax Court below. The orders of the Tax Court filed June 2, 1975 dismissing the consolidated cases 5098-72, 5337-73 and 2949-74 for lack of prosecution and affirming the Internal Revenue Service tax deficiency determinations of taxes, interests and penalties in excess of $315,000 are set forth in the appendix at A-8,A-10,A-12. The order of July 28, 1975 denying petitioner's Motion for Reconsideration of Findings and Opinion is set forth in the appendix at A-7 . The order of Nov. 7, 1975 denying petitioner's Motion to Vacate is set forth in the appendix at A-4.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Ninth Circuit was entered on March 12, 1979. A timely petition for rehearing was denied on May 23, 1979. The judgment and denial of rehearing are set forth in the appendix at A-2 and A-1 respectively. The jurisdiction of this Court is invoked under 28 U.S.C.§1254(1).

QUESTIONS PRESENTED

I. THE NINTH CIRCUIT SHOULD HAVE REVERSED THE DECISION OF THE TAX COURT AND REMANDED THE CASE FOR FURTHER PROCEEDINGS TO PREVENT A GROSS MISCARRIAGE OF JUSTICE AND TO PREVENT A DENIAL OF DUE PROCESS.

II. PETITIONER ELMER H. THOMASSEN WAS DENIED DUE PROCESS WHEN THE TAX COURT DENIED HIS MOTION TO VACATE JUDGMENT AND RECONSIDER FINDINGS AND OPINION AND WHEN THE NINTH CIRCUIT REFUSED TO REVERSE THE DECISION OF THE TAX COURT AND REMAND THE CASE FOR FURTHER PROCEEDINGS.

PRIMARY CONSITUTIONAL PROVISIONS & STATUTES INVOLVED

Constitution of the United States, Amendment V:

> No person . . . nor shall be deprived of life, liberty or property, without due proces of law; . . . .

STATEMENT OF THE CASE

Petitioner Elmer H. Thomassen and his wife Joan C. Thomassen were petitioners in the United States Tax Court in consolidated income tax cases 5098-72, 5337-73, and 2949-74. The tax deficiencies alleged by the Internal Revenue Service was approximately $315,000 in taxes, penalties and interests for the years 1964 through 1971. The Tax Court considered Elmer and Joan Thomassen as married persons filing jointly except for the tax year 1966 when the Court determined that Elmer and Joan Thomassen filed as married persons filing separately.

On October 29, 1974, both the taxpayers Elmer Thomassen and Joan Thomassen moved the Tax Court for an order allowing Jerome Daly, a disbarred Minnesota lawyer, to "speak for petitioners". This motion was denied on November 4, 1974.

On February 19, 1975, after appearances to obtain continuances of the trial date, Elmer Thomassen appeared in Court without his wife but with Karl Bray, who was not a member of any bar and who is now deceased. Karl Bray purported to represent Mrs. Thomassen, and Dr. Thomassen represented himself in propria persona.

Tax Court Judge Tietjens expressed concern about Dr. Thomassen being adequately represented.

On May 13 and 14, the dates scheduled for a trial on the merits, Dr. Thomassen represented himself in propria persona and also represented his wife per power-of-attorney filed with the court with the

court's approval. Dr. Thomassen stated that he was unable to go forward with documentation of his deductions and expenses based on his accountant-prepared records to prove that he did not owe the tax deficiencies because they were unavailable at the time set for trial. In addition his accountant was physcially and mentally incapable at that time to assist him in the reconstruction of the records.

At no time in the proceedings in Tax Court was there a trial on the merits. Upon the motion of the government, on June 2, 1975 the Tax Court dismissed the consolidated cases for lack of prosectuion and affirmed the tax deficiency determinations of the I.R.S., including taxes, interests and penalties in excess of $315,000. (A-8,A-10,A-12) On June 17, 1975, petitioner moved to vacate the orders of June 2, 1975 and on June 27, 1975 moved for reconsideration of the findings and opinion. The court denied the motion for reconsideration on July 28 (A-7) and the motion to vacate on November 7, 1975. (A-4). The Tax Court granted the petitioner's motion to proceed in forma pauperis. Tax Court petitioner timely filed a Notice of Appeal to the Ninth Circuit Court of Appeals. On March 12, 1979 the Ninth Circuit affirmed the judgments of the Tax Court (A-2). Petition for Rehearing was denied and suggestion for a rehearing en banc rejected on May 23, 1979 (A-1).

REASONS FOR GRANTING THE WRIT

I. IT IS WITHIN THE SUPERVISORY POWER OF THE SUPREME COURT UNDER ART. 1, §1 OF THE CONSTITUTION OF THE UNITED STATES TO REVERSE A DECISION OF A LOWER FEDERAL COURT AND REMAND FOR FURTHER PROCEEDINGS TO PREVENT A MISCARRIAGE OF JUSTICE

The Supreme Court has supervisory powers over the other federal courts, and in the case at bar the Supreme Court should exercise those powers in order to preserve the orderly administration of justice.

In Hormel v. Helvering, 312 U.S. 552, 557 (1941) this Court in reversing a tax case at the request of the Internal Revenue Service, stated that

> Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice.

In Hormel v. Helvering, Ibid, this Court affirmed the judgment of the lower court reversing the decision of the Board of Tax Appeals for further proceedings at the request of the Internal Revenue Service. There the Court gave the I.R.S. a second chance at presenting a prima

facia case in Tax Court. Please see also U.S. v. Smith, 437 F.2d 538 where the court held that where the government had failed to present a prima facie case, it may have a second chance if it would be "just under the circumstances" to do so. Surely if the government is to be accorded this consideration, no less is due a taxpayer who has never had a trial on the merits in the court below.

The rationale used by the Supreme Court in Hormel v. Helvering, supra to justify reversing a Board of Tax Appeals decision (now Tax Court) in favor of the the taxpayer and remanding for further proceedings at the request of the I.R.S. applies equally to the instant case:

> ...this is exactly the type of case where application of general practice would defeat rather than promote the ends of justice, and the court below was right in so holding. Ibid at 560.

At the time set for trial, May 13, and May 14, 1975, petitioner-taxpayer indicated and inability to go forward with the documentation the Court requested due to the unavailability to him of the accountant-prepared tax records (R.533-536)[1]. Petitioner-taxpayer appeared in propria persona at the Tax Court proceedings. After the Court had reluctantly granted the government's motion to dismiss (R.535,536,538)(A-1)[2] the Court indicated

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1/ All R references are to The Tax Court Record on Appeal to the Ninth Circuit.

2/ All (A-) references are to the Appendix attached hereto at the end of the petition.

to counsel that if documentary support for the taxpayers' petitions could be obtained, the taxpayers ought to be allowed the opportunity to present it in the interests of justice. (R. 564-565)(A-14 A-15).

On June 17, 1975, taxpayer Elmer H. Thomassen filed a Motion to Vacate Order of Dismissal (Tax Court Rule 162) and on June 27, 1975, a Motion for Reconsideration of Finding and Opinion (Tax Court Rule 161). (R.545-54,565-66,568-70).

The Motion for Reconsideration was denied by Judge Sterrett on July 28, 1975 (R.563)(A- 7). In his order of that date , Judge Sterrett cited the "conspicuous absence" of any affidavit by Dr. Elmer Thomassen agreeing to furnish the government with "supporting data for the claimed deductions", as the basis for his decision. (R.563)(A- 7).

However, at the time of said ruling, the Court had before it the affidavit of Melvin Friedland, counsel for taxpayers, averring that now he personally had reviewed the taxpayers' returns and accounting records, that a preponderance of evidence existed to show that the IRS had erred, that he had met with the government's agents and that further meetings were scheduled, and that all records for the years in question would be produced (R.546-47).

The Court also had before it the affidavit of taxpayer Joan Thomassen, setting forth the taxpayers' lack of personal knowledge of accounting, taxation and law and further showing that substantial and grevious injustice would result if the order of dismissal was allowed to stand because the deficiencies claimed were

so great as to more than consume their entire estate and prevent the posting of an appeal bond (R.548).

Petitioner Elmer H. Thomassen submits that Judge Sterrett's denial of said motion, on the basis that no affidavit by taxpayer Elmer Thomassen agreeing to furnish the government with supporting data had been submitted, was unreasonable. It was clear from the affidavit of taxpayer's attorney, Melvin Friedland, that he, Mr. Friedland, was the person who had personal knowledge of the documentation issue, not Dr. Thomassen; Mr. Friedland, being the one with personal knowledge, was therefore the proper affiant. In Mr. Friedland's affidavit he, as taxpayers' attorney, further specifically averred that all records for the years in question would be produced. To deny the motion for the reasons stated, in the face of the clear sworn statements of member of the Bar and officer of the Court with personal knowledge was unreasonable and inconsistent with substantial justice.

The Court's further denial, on November 7, 1975, (R.572)(A- 4) of the taxpayers' Motion to Vacate Order of Dismissal added further error. By that time, in addition to the herein-above described affidavits, the Court had before it:

(a) The August 11, 1975 affidavit of taxpayer, Dr. Elmer Thomassen, showing that he had not been personally familiar with the preparation of the tax returns in question, nor their audit; that the accountant, Morris George, was no longer physically or mentally capable of

assisting him in reconstructing said records; that therefore he, Dr. Thomassen, was now personally participating in the reconstruction of records for the subject years using other available documentation to present his case properly; and he sincerely intended to cooperate with the government (R.568-70).

(b) The further affidavit of attorney Melvin Friedland, filed August 4, 1975, summarizing his recent meetings, conversations and furnishing of records to the government; demonstrating an example of the governmental error in its method of arriving at the subject deficiencies; and specifically averring that he, Mr. Friedland, had conducted a personal search for the books, records and other documents involved; and stating on personal knowledge that said books and records were not available to the taxpayers on the dates set for trial and could not have been located with due diligence at that time (R.564-66)(A-14-A-16).

Thus the Tax Court had before it everything that it had earlier asked for, and more: facts explaining the unavailability of the original books of entry at the time set for trial, assurances both by the taxpayer and counsel that alternative documentation was available and was being recompiled and the tax years in question reconstructed, facts showing that records for the first of these years had already been presented to the government at one of several post-trial conferences, which were in progress, and the required agreement by taxpayers and counsel to go forward with the presentation of documentation at trial and cooperate fully with the government. Further, counsel's

declaration gave some specific examples of the government's errors and omissions in the preparation of its alleged deficiencies, upon which counsel had based his conclusion that the taxpayers could show by a preponderance that the deficiencies were incorrect and would do so if permitted to go forward.

In this factual context, where it then appeared that the taxpayers could support their petition, and they had averred that they would with documentation that could not have been available to them at time of trial, and where even the Court had stated its reluctance to dismiss (R.536, lines 1-2) and its belief that the taxpayers probably did not owe the total amount of the judgment (R.564-65)(A-14,15); please see also the Declaration of Melvin Friedland, attached hereto at (A-14-A-16) and incorporated herein by reference),it was inconsistent with substantial justice to deny them the right to proceed with the presentation of the merits of their case and the Ninth Circuit should have reversed the Tax Court's decision and remanded for a trial on the merits.

II. THIS IS THE TYPE OF CASE IN WHICH THE SUPREME COURT SHOULD GRANT CERTIORARI BECAUSE THE U.S. COURT OF APPEALS, WHICH HAS THE JURISDICTION TO REVIEW THE DECISIONS OF THE TAX COURT, FAILED TO PERFORM ITS SUPERVISORY DUTY TO CORRECT AND PREVENT A MISCARRIAGE OF JUSTICE

Under 26 U.S.C.§7482 the United States Courts of Appeals have exclusive jurisdiction to review the decisons of the Tax Courts except that it is subject to review by the Supreme Court of the United States

upon certiorari under 28 U.S.C.§1254.

In the Memorandum decision of the Ninth Circuit Court of Appeals dated March 12, 1979 (A-2) the Ninth Circuit indicated that it believed that the taxpayers were ". . . now ready to coooperate with the Government." but also stated that ". . . Unfortunately for the taxpayers, however, their decision to operate within the system comes too late." (A-3) (Please see Memorandum in full in Appendix at A-2,A-3.

Petitioner submits that it is never too late to give a taxpayer a second chance to prevent a miscarriage of justice and to preserve the orderly administration of justice. There would be no prejudice to the government to permit petitioner a chance to present evidence that he does not owe the tax deficiencies determined by the IRS and Tax Court. Taxpayer Elmer H. Thomassen has not had his day in court and is entitled to a trial on the merits, which he has not had at any time in the proceedings below. The proceedings in Tax Court were dismissed for lack of prosecution because the documentation of deductions was not available at the time of trial. (Please see orders of June 2, 1975 at A-8,10,12 On the contrary, giving the taxpayer a trial on the merits now that he has the proper documentation would be to the benefit of the I.R.S. because it would show other taxpayers that the taxpayer does have a chance to prove that he does not owe tax deficiencies and that the I.R.S. is willing to give the taxpayer a fair chance if he agrees to operate within the system to prove those deficiencies are not correct.

The Supreme Court in Hormel v. Helvering, supra and the Appeals Court in United States v. Smith, supra held that where the government had failed to present a prima facie case, it may have a second chance if it would be "just under the circumstances" to do so. Surely if the government is to be accorded this consideration, no less is due to taxpayers whom the Court agreed probably do not owe the crushing ($315,000.00) deficiencies assessed against them, and who have shown the ability to prove that they do not, an ability that they did not posses at the time set for trial.

The supreme Court and the appellate courts have the power not only to correct an error in the judgment entered below, but to make such disposition of the case as justice may at the time of their decision require; and, in determining what justice now requires, the Court must consider changes in fact, as well as in law, which have supervened since the decree was entered below. In Hormel v. Helvering supra the Supreme Court considered a supervening Supreme Court decision which was not decided at the time of trial in reversing the trial court. See also Brownell v. Kaufman, 102 App.D.C. 133, 251 F.2d 374; Washington v. U.S., 214 F.2d 33, cert. den. 348 U.S. 862; Re Elmore, 382 F.2d 125.

The Ninth Circuit should have vacated the Tax Court judgment and revested the trial court with jurisdiction to retry the cause. Duke Power Co. v. Greenwood County 299 U.S. 259. Here, it would not even be a re-trial, since the taxpayer-petitioner was never even able to proceed to a first

trial due to the unavailability of the accountant's books at that time, for reasons beyond the taxpayers' control, and the accountant's physical and mental incapacity to assist the taxpayers in their reconstruction.

Further, this is the very kind of case where such relief is appropriate, because of the reasonable likelihood that a different result would be reached after a full trial, an important criterion. Tanimmura v. U.S., 195 F.2d 329.

The additional criterion, that the evidence sought to be presented was not absent from trial due to a lack of diligence, Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399, has been demonstrated by Mr. Friedland's affidavit of personal knowledge of that fact based upon his personal search (R.566)(A- 16).

Supreme Courts and the appellate courts have power under 28 U.S.C.§2106 to require whatever further proceedings may be just under the circumstances is very broad and flexible. It includes the authority to vacate the order of dismissal and remand the cause to the trial court for further proceedings. The Ninth Circuit should have vacated the judgment of the Tax Court and remanded the case but since the Ninth Circuit failed to do so the Supreme Court should do so. Hormel v. Helvering, supra; Hines v. Delta Airlines, Inc., 461 F.2d 576; Frith v. Blazon-Flexible Flyer, Inc., 512 F.2d 899, cert.den., 515 F.2d 1183. The power extends to granting a new trial to all or any of the parties on all or any part of the issues. Camalier & Buckley-Madison,

Inc., 168 App.D.C. 149, 513 F.2d 407.

If the Supreme Court deems it more just to do so, it may make the remand a limited one for the finding of certain facts only. Hunter Douglas Corp. v. Lando Products, Inc., 235 F.2d 631; Thompson v. Camp, 167 F.2d 733, cert.den. 335 U.S. 824. For example, in the instant case, the Supreme Court could remand for a preliminary determination to verify the existence of the evidentiary support which has been offered, before requiring a full examination thereof at trial, or could make the remand for trial for each year in question conditional upon the physical proffer of such documentation for that year to either this Court or a pretrial determination in the court below, or whatever similar order it deems necessary to protect the substantial rights of the parties.

In this connection, it should be emphasized and kept in mind that no substantial prejudice can result to the government from permitting a trial on the merits herein. If the Thomassens do not owe the huge deficiencies alleged, no one can argue that it would be unjust to let them prove that they do not. If their proof fails, the government has lost nothing: not only does the judgment stand, but the interest thereon continues to mount.

To hold them bound by a judgment which would ruin them by more than consuming their entire estate (R.548), because of a cruel trick of fate which prevented their properly proceeding at the time appointed therefor, would be to make a fetish of procedure, an approach to the law condemned

in Hormel v. Helvering, supra. Please see also Griffith v. Utah Power & Light Co., 226 F.2d 661.

SUMMARY

At the time the Thomassens' post-trial motions to reopn this case were denied by the Tax Court, the record reflected facts which mandate that the decision be reversed:

(a) The Thomassens' books and records had been unavailable at time of trial through no fault of their own;

(b) Alternative documentation had since been located and this was being used to reconstruct the years in question;

(c) The substance thereof indicated that the Thomassens did not owe the deficiencies assessed;

(d) The submission of said documents, together with full cooperation was offered by both counsel and the taxpayer, and meetings with the government for that purpose had already commenced;

(e) The Tax Court had itself expressed doubt that the Thomassens owed that much money;

(f) No prejudice would accrue to the government if a trial on the merits were permitted, but substantial injustice and prejudice would result to the Thomassens from being denied a trial on the merits on the basis of reconstructing alternative documentation which then, but not previously, had been located.

This Honorable Court has the power, both 28 U.S.C.§2106 and its inherent equity , to do substantial justice to petitioner. Petitioner Elmer H. Thomassen will suffer a grevious wrong if it does not do so. A remand of this case for a hearing on its merits is respectfully implored.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and Memorandum of the Ninth Circuit and the Orders entered by the Tax Court below.

DATED: August 21, 1979

Respectfully submitted,

E. H. THOMASSEN
1918 Dover Drive
Newport Beach, Cal.92660
714/540-4376

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of August, 1979 three copies of the Petition for Certiorari herein were mailed by me, postage prepaid to the Solicitor General, Department of Justice, Washington, D.C. 20530.

JEANENE MOENCKMEIER
1545 Ninth Avenue
San Diego, Cal. 92101

Filed May 23,1979
Emil E. Melfi,Jr.
Clerk, U.S. Court
of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ELMER H. THOMASSEN and
JOAN C. THOMASSEN,

Petitioners-Appellants

v.

COMMISSIONER OF INTERNAL REVENUE

Respondent,Appellee.

No.76-2620

O R D E R

Before: HUFSTEDLER and TRASK,Circuit Judges, and Mc NICHOLS,* District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Hufstedler and Trask have voted to reject the suggestion for rehearing en banc. Judge Mc Nichols recommends against a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed.R. App.P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

*Honorable Ray Mc Nichols, Chief Judge, United States District Court, District of Idaho, sitting by designation.

March 12, 1978
Emil E. Melfi, Jr.
Clerk, U.S. Court
of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ELMER H. THOMASSEN and JOAN C. THOMASSEN, Petitioners-Appellants	)	No. 76-2620
v.	)	MEMORANDUM
Commissioner of Internal Revenue, Respondent-Appellee.	)	

Appeal from the United States Tax Court

Before: HUFSTEDLER and TRASK, Circuit Judges, and McNichols,* District Judge.

Appellants' motion for leave to file their supplementary opening brief is granted.

Appellants seek both reversal of the Tax Court's orders dismissing these cases and vacation and remand of the cases to the Tax Court to permit the taxpayers to produce evidence on the merits of the litigation. The Commissioner determined deficiencies in the income taxes of the taxpayers for the years 1964 through 1971, as a result of disallowing claimed business, rental, and farming expenses. Deficiency notices were accordingly issued. There-

*Hon. Ray McNichols, Chief Judge, Unites States District Court, District of Idaho, sitting by designation.

after the taxpayers filed repeated petitions in the Tax Court, non e of which, save one, ever reached the merits of the tax deficiency determinations. Instead, the petitions relied upon the claimed invalidity of the income tax laws upon constitutional grounds that have been frequently held legally frivolous. The Tax Court again and again gave taxpayers another chance to present evidence on the merits.

On the single occasion in which taxpayers resorted to counsel, the taxpayers disregarded his advice and the lawyer withdrew from the case. Not until the night before trial, did the taxpayers contact another lawyer, who sought and obtained a continuance to permit him to examine the taxpayers' books and records.

The dilatory tactics of the taxpayers did not end in the Tax Court. They failed to perfect their appeal; we dismissed the appeal by reason of their defaults, Thereafter, this court also relieved them of their defaults, and gave them an opportunity to present the appeal. When they filed their briefs, the arguments presented for our consideration were also legally frivolous, At the last moment, counsel was retained and counsel has made a valiant effort to relieve them from their multiple litigation errors.

We accept applellate counsel's assurance that the taxpayers are now ready to cooperate with the Government, Unfortunately for the taxpayers, however, their decision to operate within the system comes too late. We have conscientiously examined the full record, and we are unanimously of the opinion that there exists neither any legal nor equitable basis to vacate the dismissals entered by the Tax Court. AFFIRMED.

UNITED STATES TAX COURT
WASHINGTON, D.C. 20217

ELMER H. THOMASSEN AND JOAN C. THOMASSE, ET AL. Petitioner	)	Docket No.
	)	5098-72
v.	)	5337-73
	)	2949-74
COMMISSIONER OF INTERNAL REVENUE, Respondent.	)	

ORDER

On October 28, 1975 the Court received the following documents from petitioners (1) a document entitled "Discharge of Attorney and Substitution of E. H. Thomassen, M.D. in Propria Persona", (2) a "Notice of Appeal", in which petitioners give notice of their intent to appeal orders of dismissal and decision entered in these cases on June 2, 1975 and, (3) a document entitled "Notice of Motion and Motion for Leave so to Proceed in Forma Pauperis in Appeal from Tax Court". A review of the Court's official files in these cases discloses that an order of dismissal and decision was entered in each of these cases on June 2, 1975. On June 17, 1975 counsel for petitioners timely filed pursuant to Rule 162, Tax Court's Rules of Practice, a "Motion to Vacate Order of Dismissal" in each of these cases. On June 27, 1975 said counsel filed a "Motion for Reconsideration of Finding and Opinion". On July 8, 1975 counsel for respondent filed in each of these cases a "Notice of Objection to MOtion to Vacate Order of Dismissal and to Motion for Reconsideration of Findings and Opinion".

On August 4,1975 petitioners' counsel filed a "Declaration in Support of Motion to Vacate Order of Dismissal and to Move for Reconsideration of Finding and Opinion". On July 28, 1975 an order was served upon counsel for the parties in which petitioners' "Motion for Reconsideration of Finding and Opinion" filed in each case on June 27, 1975 was denied. No action has been taken to date upon petitioners Motion to Vacate Order of Dismissal filed in each of these cases on June 17, 1975.

On August 11, 1975 the Court received from petitioner Elmer H. Thomassen a document entitled "Affidavit of Petitioner Elmer H. Thomassen in Support of Motion to Vacate Order of Dismissal." The Clerk of the Court is hereby directed to filed that document as of this date and he is to serve a copy thereof upon counsel for respondent together with a copy of this order. After due consideration and based upon the record in each of these cases in its entirety, it is

ORDERED that petitioners' Motion to Vacate Order of Dismissal filed in each of these cases on June 17, 1975 is hereby denied. It is further

ORDERED that the Clerk of the Court is hereby directed to file the aforesaid document entitled Discharge of Attorney and Substitution of E. H. Thomassen, M.D. in Propria Persona in each of these cases as of the date received, October 28, 1975, as a motion to withdraw counsel of record and that motion is herewith granted and Melvin L. Firedland, Esq., is hereby withdrawn as counsel of record in each of these cases.

Since the aforesaid Notice of Appeal and Notice of Motion and Motion for Leave so to Proceed in Forma Pauperis in Appeal from the Tax Court were received by the Court prior to the Court's taking action on the aforesaid Motion to Vacate Order of Dismissal filed in each of these cases on June 17, 1975 those documents were premature on the date received. However, since its petitioners' stated intent to appeal from the order of dismissal and decision will act upon those docuements by separate order dated subsequent to this date.

/s/ Samuel B. Sterret
Judge

Dated: Washington D.C.
November 7, 1975

UNITED STATES TAX COURT
WASHINGTON

ELMER H. THOMASSEN and JOAN C. THOMASSEN, ET AL	Docket No.
Petitioner,	5098-72
v.	5337-73
	2949-74
COMMISSIONER OF THE INTERNAL REVENUE	

ORDER

In view of the entire prolonged record in this matter,.including the fact that an affidavit from petitioner Elmer H. Thomassen agreeing to furnish the respondent with supporting data to the claimed deductions is conspicuously absent, petitioner's "Motion For Reconsideration of Finding and Opinion" filed in each of the above dockets on June 27, 1975, is hereby denied.

/s/ Samuel B. Sterrett
Judge

Dated: Washington D.C.
July 28, 1975

UNITED STATES TAX COURT

Washington

ELMER H. THOMASSEN & JOAN C. THOMASSEN Petitioner	)	
v.	)	DOCKET NO 5098-72
COMMISSIONER OF INTERNAL REVENUE, Respondent	)	

ORDER OF DISMISSAL AND DECISION

This case was called from the calendar for the trail session of the Court at Los Angeles, California on May 12, 13, and 14, 1975, pursuant to notice. Petitioner Elmer H. Thomassen, having appeared, filed with the Court on May 12th, a Power of Attorney for his wife, Petitioner Joan C. Thomassen. At the recall of the case on May 14, 1975, Petitioner Elmer H.Thomassen stated that he could not proceed due to the fact that he was unable to prepare properly his books and records and that he preferred to stand on his constitutional rights. Cou-sel for the Respondent moved the Court to dismiss this case and enter a decision for the Respondent. After due consideration of the long history of this matter and for cause appearing in the transcript of the proceeding this date, it is

ORDERED, that REspondent's motion is granted and this case is dismissed for lack of prosecution. It is further

ORDERED and DECIDED: That there are deficiencies in income tax, together with additions to the tax due from the Petitioners,

Elmer H. Thomassen and Joan C. Thomassen for the taxable years ended December 31, 1964, 1965, 1967, and 1968 as follows:

ADDITIONS TO THE TAX
I.R.C. of 1954

Year	Income Tax	Section 6653(a)
1964	$19,553.39	$997.67
1965	$29,614.49	$1,480.72
1967	$28,342.24	$1,417.11
1968	$37,089.00	$1,854.00

Further, that there is a deficiency in income tax, together with additions to the tax due from the petitioner

SERVED JUNE 2, 1975

Joan C. Thomassen for the taxable year ended December 31, 1966, as follows:

ADDITIONS TO TAX
I.R.C. of 1954

Year	Income Tax	Section 6651(a)	Section 6653(a
1966	$12,453.10	$3,113.27	$622.65

Further, that there are deficiencies in income tax together with additions to the tax due from the Petitioner Elmer H. Thomassen for the taxable year ended December 31, 1966, as follows:

ADDITIONS TO TAX
I.R.C. of 1954

Year	Income Tax	Section 6651(a)	Section 6653(a)
1966	$12,859.00	$3,214.75	$642.95

Entered Jun 2, 1975/s/
Judge

UNITED STATES TAX COURT
WASHINGTON,D.C.20217

ELMER H. & JOAN C. THOMASSEN Petitioner,	)	
v.	)	Docket No. 5337-73
COMMISSIONER OF INTERNAL REVENUE, Respondent.	)	

ORDER OF DISMISSAL AND DECISION

This case was called from the calendar for the trial session of the Court at Los Angeles, California on May 12, 13 & 14, 1975, pursuant to notice. Petitioner Elmer H. Thomassen, having appeared, filed with the Court on May 12, 1975, a Power of Attorney for his wife, Petitioner Joan C. Thomassen. At the recall of the case on May 14, 1975, Petitioner,Elmer H. Thomassen stated that he was unable to prepare properly his books and records and and that he preferred to stand on his constitutional rights. Counsel for the Respondent moved the Court to dismiss this case and enter a decision for the Respondent. After due consideration of the long history of this matter and for cause appearing in the transcript of the proceedings, it is

ORDERED, that Respondent's motion is granted and this case is dismissed for lack of prosecution. It is further

ORDERED AND DECIDED: That there are deficiencies in income tax, together with additions to the tax, due from Petitioners Elmer H. Thomassen and Joan C. Thomassen

for the taxable year ended Dycember 31, 1969 as follows:

	ADDITIONS TO THE TAX - IRC. of 1954	
Year	Income Tax	Section 6653(a)
1969	$49,484.00	$2,474.00

/s/ Samuel B. Sterrett
JUDGE

Entered June 2, 1975
Enter:

Served June 2,1975

UNITED STATES TAX COURT
WASHINGTON, D.C. 20217

ELMER H. THOMASSEN & JOAN M. THOMASSEN, Petitioner,	)	Docket No. 2949-74
v.	)	
COMMISSIONER OF INTERNAL REVENUE, Respondent.	)	

ORDER OF DISMISSAL AND DECISION

This case was called from the calendar for the trial session of the Court at Los Angeles, California on Mayl2, 13, &14, 1975, pursuant to notice. Petitioner Elmer H. Thomassen, having appeared, filed with the Court on May 12, 1975, a Power of Attorney for his wife, Petitioner Joan M. Thomassen. At the recall of the case on May 14, 1975, Petitioner, Elmer H. Thomassen stated that he was unable to prepare properly his books and records and that he preferred to stand on his constitutional rights. Counsel for the Respondent moved the Court to dismiss the case and enter a decision for the Respondent. After due consideration of the long history of this matter and for cause appearing in the transcript of the proceedings, it is

ORDERED, that Respondent's motion is granted and this case is dismissed for lack of prosecution. It is further

ORDERED and DECIDED: That there are deficiencies in income tax, together with additions to the tax due from the

Petitioners Elmer H. Thomassen and Joan M. Thomassen for the taxable year ended December 31, 1970 as follows:

	ADDITIONS TO THE TAX I.R.C. OF 1954	
Year	Income Tax	Section 6653(a)
1970	$56,970.00	$2,849.49

Further, that there is a deficiency in income tax, together with additions to the tax, due from the Petitioner Joan M. Thomassen, for the taxable year ended December 31, 1971, as follows:

	ADDITIONS TO THE TAX I.R.C. of 1954		
Year	Income tax	§6651(a)	§6653(a)
1971	$19,255.80	$4,813.95	$962.79

§6654
$616.19

Further, that there is a deficiency in income tax, together with additions to the tax, due from the Petitioner Elmer H. Thomassen for the taxable year ended December 31, 1971 as follows:

	ADDITIONS TO THE TAX I.R.C. OF 1954		
Year	Income Tax	§6651(a)	§6653(a)
1971	$19,841.00	$4,960.00	$992.05

§6654
$634.91

Entered
June 2, 1975

/s/ Samuel B. Sterrett
Judge

UNITED STATES TAX COURT

U.S.TAX COURT
FILED
AUG. 4, 1975

ELMER H. and JOAN C. THOMASSEN, Petitioners,	
v.	Docket Nos.
COMMISSIONER OF INTERNAL REVENUE,	5098-72 5337-73 2949-74
Respondent.	

DECLARATION IN SUPPORT OF MOTION TO VACATE ORDER OF DISMISSAL AND TO MOVE FOR RECONSIDERATION OF FINDINGS AND OPINION

In support of the Motion to Vacate Order of Dismissal and Motion for Reconsideration of Findings and Opinion, the Petitioner respectfully shows unto the court:

1. On May 14, 1975 your declarant was conditionally admitted to practice before the Tax Court for the purpose of representing the Petitioner.

2. At that time your declarant advised the Tax Court that he was unable to obtain the necessary documents to go forward with the case on the merits.

3. Subsequent to tne granting of Respondent's Motion to Dismiss for Lack of Prosecution at trial on May 14, 1975, your declarant, in the presence of an agent of the Respondent, MELVERN STEIN, informally met with JUDGE STERRET.

4. At this meeting it was strongly suggested by JUDGE STERRET that should Petitioner come forward with the documentation which would allow the presentation of the case on the merits, Respondent should join Petioner in a Motion to Vacate the Order of Dismissal, in furtherance of the interests of justice.

5. At said meeting it was your declarant's belief that the recommendation of JUDGE STERRET was agreeable to the Respondent.

6. Beginning June 5, 1975 your declarant, in furtherance of this spirit of accommodation held numerous conversations with agents of the Respondent and on two separate occasion appeared in Los Angeles, at the office of the Respondent, with all records of the Petitioner for the year 1964.

7. At the first meeting at said Respondent's office, it was clear that Respondents were not personally familiar with the methodology utilized by Respondent to arrive at the alleged deficiencies in Petitioner's 1964 return.

8. At the second meeting, following a cancellation by Respondent, the original field agent was present who advised your declarant, that he had not personally inspected Petitioner's 1964 return, but rather interpolated a Tax Court finding for Petitioner's 1963 return and from an audit of Petitioner's 1967 return.

9. Said agent produced for and presented to your declarant, the data

relied upon. Accordingly, a subsequent meeting was scheduled in order to document said data.

10. The subsequent meeting was continued initially by Petitioner and then cancelled by Rspondent based on the Motions currently before the Court.

11. Your declarant has personally reviewed and audited all available records for the tax year ending December 31, 1964 and upon such audit and compilation of data believes that evidence now exists that materially affects such determination for said tax year.

12. Your declarant based on his review of said 1964 records, further believes that material evidence is similarly available for the other years before this court.

13. Your declarant has conducted a personal search for Petitioner's books, records, and other documents, and therefore alleges on personal knowledge that said records and books were not available to Petitioner on or about May 13, and 14, 1975, and could not have been located with due diligence at that time.

14. Respondent will in no wise be prejudiced by the granting of a new trial.

WHEREFORE, it is prayed that Petitioner's Motion to Vacate Order of Dismissal and Motion for Reconsideration of Findings and Opinion be granted.

Dated: (date unreadable)

/s/
Melvin L. Friedland
Attorney for Petitioner

Nos. 79-286 and 79-290

In the Supreme Court of the United States

OCTOBER TERM, 1979

JOAN C. THOMASSEN, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ELMER H. THOMASSEN, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-286

JOAN C. THOMASSEN, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

No. 79-290

ELMER H. THOMASSEN, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioners[1] seek review of the decision below upholding the Tax Court's dismissal of their suits for redetermination of income tax deficiencies because of their failure to prosecute them.

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[1]Joan Thomassen is a party because she filed joint income tax returns with her husband for all years except 1966. The Tax Court issued consolidated opinions with respect to both petitioners. Elmer Thomassen and Joan Thomassen have filed separate petitions for certiorari. Since the facts and legal issues are the same with respect to both petitioners, we are responding in this single memorandum in opposition.

The pertinent facts are undisputed and may be summarized as follows: Petitioners commenced these actions in the Tax Court for redetermination of income tax deficiencies, penalties and interest for the period 1964-1971. They filed seven petitions and amended petitions. Six of these pleadings merely alleged generally that the income tax was unconstitutional; that the deficiency determinations were contrary to the teachings of the Bible, that the burden of proof was on the government, or that the taxpayers owed no tax (R. 1, 53, 116, 163, 208, 369, 380, 392).[2] The single petition that addressed the issues was prepared in 1972 by an attorney retained by petitioners following the dismissal of their third amended petition. Upon entry into the case, this attorney filed a motion to vacate the order of dismissal. Attached to the motion was an affidavit of petitioner Joan Thomassen in which she alleged, *inter alia*, that neither she nor her husband had any training in accounting, law or taxation and that they had relied on nonprofessional advice in preparing their petition and amended petitions, "not realizing fully the burden of proof to be met by said Petition and the complexities of draftmanship inherent in said feat" (R. 152, 155-157, 163). The Tax Court thereupon vacated its order of dismissal and petitioner's counsel filed an amended petition (R. 162, 163-172). Subsequently, petitioners filed petitions and amended petitions for later years, without assistance of counsel, in which they reverted to their earlier constitutional, Biblical and burden of proof arguments. In the end, petitioners' counsel withdrew from the case because his advice was disregarded (R. 366).

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[2] "R." refers to the record appendix in the court of appeals.

Throughout the proceedings, the Tax Court carefully explained to petitioners the requisite contents of a petition and urged them to make their books and records available to the Internal Revenue Service so that the cases could be made ready for trial (R. 325-333, 337-347, 359-360, 365, 428-441). Petitioners repeatedly rejected this advice. The cases were eventually set for trial on February 18, 1975. Petitioners were accompanied at the hearing by Karl Bray who represented himself as an attorney admitted to practice in Massachusetts. Bray requested, and was granted, a continuance in order to familiarize himself with the case and because the court deemed it important that petitioners have an attorney to assist them (R. 462-466). Subsequent to the February 18, 1975 hearing, it was brought to the court's attention that Mr. Bray was not admitted to practice in Massachusetts and was in fact not a lawyer (R. 473-477). On May 13, 1975, the trial commenced. Petitioners were assisted by Bray and an attorney named Friedland, who had been retained on the eve of trial and who conceded that, because of his late entry into the case, he could offer no meaningful representation. On the second day of trial, the court again asked petitioners to proceed with their burden of proof, but they refused entirely to put on any evidence, explaining that on the eve of trial they could not collect their books and records. Instead, petitioners restated their arguments that the burden of proof was on the government and that their constitutional rights were abridged (R. 497-538). Ultimately, the Tax Court dismissed the cases for failure to prosecute (R. 540-544).

Although petitioners sought review (R. 578), they failed to prosecute their appeal; accordingly, the court of appeals dismissed their cases. In response to petitioners' motion to vacate that order, the court of appeals reinstated the appeal and heard oral argument by

petitioners' new counsel. On March 7, 1979, petitioners advised the court of appeals that they had discharged their new attorney and once again elected to represent themselves. The court of appeals affirmed (79-290 Pet. App. A-2-A-3).

1. Petitioner Elmer Thomassen contends (79-290 Pet. 6-16) that this Court should exercise its supervisory powers and remand the case for further proceedings to prevent a miscarriage of justice because only through a "cruel trick of fate" were they prevented from producing their books and records (79-290 Pet. 15). He asserts (79-290 Pet. 6) that they are now ready to reconstruct their records and that the government would not be prejudiced if they were given a second chance to establish their case (79-290 Pet. 12, 15-16). But it is well established that a trial court has discretion to dismiss a suit when the moving party fails properly to prosecute the action he initiated. *Link* v. *Wabash R.R.*, 370 U.S. 626 (1962); *Montgomery* v. *Commissioner*, 367 F. 2d 917 (9th Cir. 1966).

Throughout these proceedings, the Tax Court was generous and patient to an excess in explaining to petitioners the requisite contents of a petition and the character of proof that would be required to put on a *prima facie* case. Petitioners, however, rejected this assistance. The court again gave them ample opportunity on three different trial dates to advance their case for a redetermination of income tax deficiencies and repeatedly urged them to present their proof. However, they again rejected the Tax Court's suggestion. As the court of appeals correctly noted (79-290 Pet. App. A-3):

> We accept appellate counsel's assurance that the taxpayers are now ready to cooperate with the Government. Unfortunately for the taxpayers, however, their decision to operate within the system

comes too late. We have conscientiously examined the full record, and we are unanimously of the opinion that there exists neither any legal nor equitable basis to vacate the dismissals entered by the Tax Court.

2. For the first time, Joan Thomassen argues (79-286 Pet. 9-23) that she was deprived of property without due process because the Tax Court and court of appeals permitted her husband, who was not an attorney, to represent her (79-286 Pet. 9-23). But the cases prohibiting a person not admitted to the bar to represent another do not support Joan Thomassen's claim. Both petitioners signed all of the petitions and amended petitions filed in the Tax Court, the notice of appeal and the briefs in the court of appeals. In seeking reconsideration by the Tax Court of the dismissal of that petition, Joan Thomassen filed an affidavit declaring her recognition of the need for professional assistance in the preparation of their cases (R. 157-158). The Tax Court thereafter vacated its order of dismissal and petitioners' new attorney filed the only acceptable pleading in this case. Petitioners, however, refused his subsequent advice and, in due course, the attorney withdrew. In 1975, Joan Thomassen executed a power of attorney authorizing her husband to represent her "in any and all court proceedings pertaining to said income tax years 1964 three 197 [*sic*]" (79-286 Pet. App. A13-A15). Even in the court of appeals, Mrs. Thomassen and her husband elected to discharge their lawyer and represent themselves. In these circumstances, Joan Thomassen can hardly complain (79-286 Pet. 7) that she was an unwitting party to these proceedings or that "Dr. Thomassen's representation * * * was grossly inadequate, improper and bizarre."

It is therefore respectfully submitted that the petitions for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

OCTOBER 1979

DOJ-1979-10

see

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